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BEFORE THE WAITANGI TRIBUNAL

WAI 2358

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IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

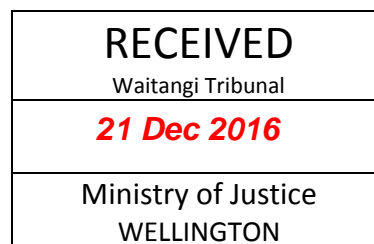
the National Fresh Water and Geothermal  
Resources Inquiry

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**MEMORANDUM OF COUNSEL FOR THE CROWN REGARDING  
FURTHER CROWN EVIDENCE AND OTHER MATTERS**

**21 December 2016**

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**MAY IT PLEASE THE TRIBUNAL:**

**Introduction**

1. In this memorandum, the Crown:
  - 1.1 seeks leave to file further evidence to assist the Tribunal in the Stage Two inquiry;
  - 1.2 seeks timetable directions for the Crown to file its evidence, including evidence in response to any further evidence filed by interested parties; and
  - 1.3 provides an update on Crown policy development.

**Scope of Stage Two issues**

2. The Crown had understood Stage Two as being focused on the proposals contained in the consultation document *Next Steps for Fresh Water (Next Steps)*. This interpretation was informed by the Tribunal's memorandum-directions convening Stage Two,<sup>1</sup> as well as the Tribunal's discovery order.<sup>2</sup>
3. The Crown's evidence filed in October 2016 reflected this understanding of the scope of the inquiry.<sup>3</sup>
4. During the first hearing week, it became apparent that the Tribunal intends to inquire into issues that are significantly broader than originally anticipated by the Crown and outlined in the Tribunal's directions issued in advance of hearing week 1. The Crown apprehends that the Tribunal intends to inquire into a range of matters that fall outside the *Next Steps* proposals.
5. Counsel has sought instructions on a range of matters raised by claimants and Tribunal members during the first hearing week.
6. In light of the Tribunal's apparent approach, and subsequent instructions, the Crown considers further Crown evidence would assist the Tribunal.

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<sup>1</sup> Wai 2358, #2.5.60, at [32]: "Our decision, therefore, is that hearings will be held as planned on the reform options which have been the subject of consultation in the *Next Steps for Fresh Water* in February–April 2016."

<sup>2</sup> Wai 2358, #2.5.62, at [4]–[6].

<sup>3</sup> Wai 2358, #D87, Brief of Evidence of S De Malmanche; #D88, Brief of Evidence of T Gerrard; and #D89, Brief of Evidence of P Brunt.

### **Leave sought to file further Crown evidence**

7. The Crown accordingly seeks leave to file further evidence in Stage Two. The Crown considers this can be accommodated within the current timetable and in a manner that minimises any prejudice to other parties.
8. In particular, should parties wish to file evidence in reply to the additional Crown evidence, any such evidence could be heard during the third hearing week if necessary. Counsel submit it should be possible to accommodate reply evidence before the Iwi Leaders Group and Crown witnesses are heard.
9. The scope of any additional Crown evidence is not yet confirmed and will depend upon instructions that are likely to be provided in late January 2017.
10. However, to assist the Tribunal in considering the Crown's request for leave, counsel can advise that initial consideration has been given to additional evidence regarding:
  - 10.1 scientific monitoring of water quality, and the Ministry for the Environment's approach to water quality issues. This evidence will provide additional detail to Ms De Malmanche's evidence; and
  - 10.2 policy considerations regarding the construction of water management regimes in New Zealand, including the policy background to reform of the RMA, the work of the Land and Water Forum, and amendment of the National Policy Statement for Freshwater Management.

### **Evidence in response to further evidence from interested parties**

11. Certain interested parties have indicated that they will advance a separate case theory to that of the New Zealand Māori Council, and intend to file extensive further evidence by 20 January 2017. However, the Crown cannot at present clearly identify the case advanced against it by many of the interested parties: there are no amended pleadings for Stage Two, and the Crown has not received opening submissions or statements of position for most interested parties. In such circumstances, it is difficult for the Crown to anticipate the interested parties' case in the absence of their evidence.

12. The Crown has been directed to respond to any further evidence from interested parties by 3 February 2017. The Crown anticipates significant difficulties in reviewing this further evidence and finalising briefs on such complex and extensive issues within two weeks, as currently timetabled.
13. The Crown accordingly seeks:
  - 13.1 a direction that the interested parties file a statement of position clarifying their separate case theory compared to the New Zealand Māori Council; and
  - 13.2 an extension to the timetable for the Crown to file its evidence in response to the further evidence filed by interested parties. The Crown proposes aligning the filing date for this evidence with the date for filing any further Crown evidence proposed. This is discussed further below.

#### **Proposed amendments to timetable**

14. The Crown proposes:
  - 14.1 the second hearing week in March 2017 should continue as scheduled;
  - 14.2 further Crown evidence (both in response to further evidence from interested parties, as well as the additional evidence for which leave is sought) to be filed by 21 April 2017;
  - 14.3 any evidence in reply to additional Crown evidence to be filed by 26 May 2017;
  - 14.4 a judicial teleconference to be held following the filing of additional reply evidence; and
  - 14.5 the timetable for the third hearing week in June 2017 should incorporate hearing of reply evidence, if necessary, in the first one to two days.

**Update on Crown policy development**

15. Counsel is instructed that in late January or February 2017 Ministers may make decisions on the changes they propose to make to the National Policy Statement for Freshwater Management. Following that decision the proposals will be released for public consultation.

21 December 2016



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J R Gough / D A Ward  
Counsel for the Crown

**TO:** The Registrar, Waitangi Tribunal  
**AND TO:** Claimant counsel